

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NO. 77-4200

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

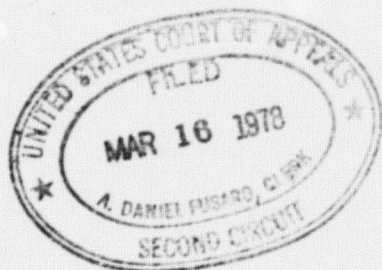
NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DESCO VITRO-GLAZE OF SCHENECTADY,
INC., AND LOCALS 6 AND 16, BRICKLAYERS,
MASONS, PLASTERERS, MARBLE, TILE AND
TERRAZZO WORKERS,

Respondent.

BRIEF FOR RESPONDENT,
DESCO-VITRO GLAZE OF SCHENECTADY,
INC.



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STATEMENT OF ISSUES PRESENTED

1. Whether the NLRB exceeded its authority when it set aside a completed hearing before an Administrative Law Judge, setting aside the findings, decision and recommendations of the Administrative Law Judge, and ordering a remand for a complete new hearing, supplemental decision, findings of fact and conclusions of law.

2. Whether a construction employer illegally assists a construction union in violation of §8(a)(1), (2) and (3) of the Act when it enters into a collective bargaining contract containing a valid union security clause and forces its provisions in the face of another construction union's claim to work jurisdiction.

3. Does a construction employer withdraw recognition from a construction union in violation of §8(a)(1) and (5) of the Act when it awards work jurisdiction of contested work to another competing construction trades construction union.

4. Does a construction union violate §8(b) (1)(a) and (2) of the Act when, after being awarded a work assignment, by entering into a collective bargaining agreement and soliciting employee membership under a union security clause in this agreement where another building trades union claims the work jurisdiction.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et. seq.) for enforcement of its order issued against Desco Vitro Glaze of Schenectady, Inc. (herein referred to as "Desco") and Locals 6 and 16 of the Bricklayers, Masons, Plasterers, Marble, Tile and Terrazzo Workers (herein referred to as "Locals 6 and 16"). (A. 424-432).¹

A hearing was held on June 11 and 12, 1975 before Administrative Law Judge James V. Constantine. On September 8, 1975, Judge Constantine issued his decision, finding on behalf of Desco and Locals 6 and 16, dismissing the complaint of the National Labor Relations Board. (A. 434-452). Exceptions to the factual findings of Administrative Law Judge Constantine were filed by the General Counsel for the Third Region of the National Labor Relations Board. (A. 453-455). After the case was transferred to the National Labor Relations Board, the National Labor Relations Board, in its Order dated March 1, 1976, remanded the case to a new Administrative Law Judge for a hearing de novo on the basis that "both the General Counsel and

¹"A." references are to pages of the printed appendix.

Respondent Employer were prevented by the Administrative Law Judge from presenting and fully developing relevant evidence at the hearing to an extent which, in our view, constitutes a denial of due process." (A. 470-472). Respondent employer and respondent unions made motions for reconsideration to the National Labor Relations Board, which were denied. (A. 473-476; 477-478). A new hearing was convened by Administrative Law Judge Michael O. Miller on June 2, 1976 and August 3, 4 and 5, 1976. Respondents Desco and Locals 6 and 16 renewed their motions and they were entered as Board's Exhibits 1(Y), 1(Z) and 1(AA). Administrative Law Judge Miller made credibility findings completely opposite to those made by Administrative Law Judge Constantine, finding respondent Desco in violation of §8(a)(1), (2), (3) and (5) of the Act, and respondent Locals 6 and 16 in violation of §8(b)(1), (A) and (2) of the Act. (A. 405-423).

The National Labor Relations Board, upon transfer of the case to it, issued its decision on June 23, 1977, and is reported at 230 NLRB No. 42. (A. 424-432).

FACTS AS FOUND BY THE BOARD
OR IN THE RECORD

a. The Employer's collective bargaining history.

Desco is engaged in business as a construction contractor. The business began in 1953 and changed ownership commencing in January of 1972 and completed on January 18, 1973. (A. 31).

In the beginning the company installed cementous terrazzo and tile floors and walls. Some of the installations were also done by the application of special chemical coatings. When the ownership of the corporation changed, the emphasis on the type of work taken by the company also changed.

Desco, under direction of the new management, eliminated the use of cementous terrazzo and tile and specialized in the installation of special chemical coatings. (A. 206-207; 239-241). The installation of cementous terrazzo tile floors and walls required the use of large quantities of cement into which marble chips and stone were mixed. The mixture was laid on a floor with a trowel, evened off, and then ground. Traditionally, tile and terrazzo setters performed the installation and were assisted by helpers. The helpers belonged to Local 59 of the Helpers International Union and the tile and terrazzo workers were members of the Masons International.

The application of special chemical coatings involved the use of epoxy bases laid in a thin coat, into which marble or decorative chips were added. The special

chemical coatings required special and technical knowledge of surface preparation, chemical reactions in mixing and different procedures of installation. The complexity of installation varied from system to system. (A. 239-240; 247-250).

From 1953 on, Desco was a member of Eastern New York Construction Employers, Inc., an association of building contractors. As a member of this association, it bound itself to the collective bargaining agreement which was negotiated between the association and the Masons Unions, including Locals 6 and 16. (A. 45b-c; 406-407). Mason employees worked under the terms and conditions of this association's contract.

On December 17, 1968, Desco became a member in good standing of the National Association of Decorative and Architectural Finishes, Inc. (herein referred to as "NADAF"). (A. 46; 236-237; General Counsels Exhibit No. 3). On February 1, 1972, NADAF, on behalf of its members, entered into a national tri-party agreement with the Bricklayers, Masons and Plasterers International Union and the International Brotherhood of Painters and Allied Trades. (A. 410; 217; 509-513).

From February, 1972, the employees of Desco installed the special chemical coatings under the terms and conditions of the NADAF agreement. (A. 237).

At an arbitration hearing called by Local 59 in November of 1973, Desco advised Local 59 that it was a member of NADAF and as such was bound by the agreement when it

became effective in February of 1972. Desco took the position that the arbitration panel had no jurisdiction over Desco because it had no signed collective bargaining agreement with Local 59, and that the applicable collective bargaining agreement was the NADAF agreement. (A. 237-239; 164-165).

From 1953 to February of 1973, Local 59 was recognized as the collective bargaining representative of the helpers. (A. 407; 17;32). At no time did Desco execute a written contract with Local 59. The employees were paid the wages and fringes which were negotiated by the Capital District Tile, Marble, Terrazzo and Slate Contractors Association and Local 59. (A. 407; 36-37; 120; 490-498).

On May 8, 1967, the company executed a letter of intent to be bound by the terms of that agreement and to pay the wages and benefits of the agreement retroactively. (A. 407; 12, 16; 483).

From February of 1973 to January of 1975, the non-masons were paid a wage rate equivalent to that which was negotiated in the area Local 59 Helpers contract and contributions were made into the Helpers Pension Funds on the employees' behalf. This wage rate and the benefits were also the prevailing wage rates and benefits posted on public improvement contracts. (A. 267-268).

There is no evidence in the record that a petition was filed before the National Labor Relations Board by Local 59 pursuant to §9 of the Act, seeking certification; nor is there any evidence in the record that Local 59 advised Desco that it represented a majority of the employees in an

appropriate unit. (A. 308).

From 1967 to December of 1974, Local 59 never requested Desco to negotiate or sign a collective bargaining agreement. (A. 308) From December 1974 up to February 18, 1975, agents of Local 59 simply tendered to Desco the area wide agreement for signature. In fact, David Lavenberg, Business Agent for Local 59, never demanded negotiations between Desco and Local 59. (A. 131-132; 138-140; 141-142; 146-147).

In addition to the above-referred to contracts and organizations, Desco was also a member of the Capital District Painting and Decorating Contractors of America and bound to the area wide contract.

As a member of the NADAF association, Desco was bound to the terms of the NADAF agreement, specifically by Article III entitled "WORK RULES":

"...G. Contractors shall work in any given area under the appropriate BMPIU or IBPAT Collective Bargaining Agreements applicable to such area."

(A. 229-238).

Although bound to the area tile and terrazzo contract by the NADAF agreement, the Business Agent of Local 6, Aldo Malossi, on January 30, 1975 requested that Desco sign a local agreement to insure employees' coverage under the pension and welfare funds. (A. 297).

The NADAF agreement, the Mascons, Bridglayers agreement; and the Tile and Terrazzo agreement all contain union security clauses. (Employer's Exhibits 1 and 2; General Counsel's Exhibit 10).

Between December 1972 and December 1974, the company employed between four and nine employees as helpers. (A408.) Local 59 never referred an employee to Desco from January 1972 on. (A. 252).

The record evidence shows that Desco employed from 20 to 50 employees at any one point in time, depending upon how many jobs were in progress. (A. 259, 242.)

- b. Events leading up to the filing of unfair labor practice charges by Local 59.

In December of 1974, David Lavenberg mailed to Desco three copies of Local 59's area agreement for signature by Desco. (A. 131-32). During the following two to three weeks, Lavenberg contacted Desco, on two separate occasions, and inquired as to the status of the agreement. Joe Cordi stated that he had not reviewed the contracts but would get back to Lavenberg. He did not sign nor refuse to sign the agreements at this time. (A. 131-133).

On January 24, 1975, Lavenberg went to Desco's construction site at the Empire State Plaza, Albany, New York; and at this point, for the sake of brevity, Desco has read the points outlined in the facts of the Board contained on pages 7 through 12 of their brief, and finds them to be accurate, with the addition of the following facts:

That on January 27, 1975 at the confrontation among Lavenberg, Cordi and two of Desco's employees, one employee, Hamilton, asserted that he had been coerced by

Local 59 into filing an application. (A. 276-280).

Local 59, through its international, submitted the dispute with Desco and respondent Locals 6 and 16 to the National Joint Board for the Settlement of Jurisdiction Disputes. (A. 150-152; General Counsel's Exhibit 16; A. 501).

On March 14, 1975 the impartial jurisdictional disputes board found that a jurisdictional dispute existed between Local 59 of the Helpers Union and Locals 6 and 16.

The picketing began at the Empire State Plaza, Albany, New York, on March 31, 1975, with pickets carrying signs which read "Local 59 Tile, Marble Helpers claims all work awarded in the recent decision by the Impartial Jurisdictional Disputes Board against Desco Vitro Glaze and Local 6 and 16, BMPIU". One week later, picketing commenced at another jobsite at the Glens Falls Hospital, Glens Falls, New York, with pickets carrying signs reading "Desco Vitro Glaze refuses to recognize the jurisdiction of Terrazzo Helpers of Local 59, Tile and Marble Helpers, Albany, New York." (A. 155).

On March 31, 1975, two employees picketed, namely, Allie Mohamed and Dimitrius Evangelidis. Everyone else continued to work. (A. 308).

Every employee who picketed or went on strike came back to work. The company never refused to reinstate the strikers. (A. 309).

In January of 1975, Desco re-applied for membership in NADAF in order to reinstate itself as a member in good standing and clear up any ambiguity regarding Desco's continued membership. (A. 317-329).

c. The unit for collective bargaining.

The record shows that since February of 1972 Desco's employees worked under the NADAF agreement which contained a union security clause. By the provisions of that agreement and the union security clause, the employees were to join either the Masons or the Painters Unions. Local 59 of the Helpers Union never had an executed collective bargaining agreement and, at best, only received a letter of intent in May of 1967.

In November of 1973, Local 59 attempted to bring Desco to arbitration under its area agreement. Desco informed Local 59 and the arbitrators that no agreement existed between Desco and Local 59. Desco further informed Local 59 that the employees were working under the NADAF agreement. In fact, Lavenberg conceded the fact that the arbitration meeting broke up because Mr. Cordi did not have a signed agreement with Local 59 and Local 59 had no jurisdiction over Desco. (A. 165). Local 59 made no further claim to representation nor requested the execution of a contract.

From November 1973 on, approximately 20 to 50 employees were employed by Desco at any point in time. Local 59 was never called upon to supply Desco with employees. Lesser trained employees (helpers) as a matter of practice, were promoted to mechanic when they acquired adequate proficiency. (A. 409).

All the employees performed all functions that they

were capable of performing. The lesser trained employees were limited, but the more trained persons (mechanics) were not limited in the functions they performed. (A. 239-252; 259-268). All of the employees had the same supervisors, were paid in the same manner, received the same travel pay, and were the same except that the lesser trained employees were paid pension benefits through the Trustees of Local 59 pension fund. (A. 271-274). Further, no union stewards were appointed as is required under Local 59's contract.

ARGUMENT

1. Propriety of Board's Remand.

Although the Board in its order of remand does not cite the authority under which it took such action, it is assumed that it did so pursuant to §10(c) of the Act and §§102.48 and 102.49 of the Statement of Procedures, Rules and Regulations, Series 8, 29 SFR, Chapter 1.

Section 102.49 reads as follows:

Modification or setting aside of order of Board before record filed in court; action thereafter -- Within the limitations of the provisions of section 10(c) of the act, and section 102.48 of these rules, until a transcript of the record in a case shall have been filed in a court, within the meaning of section 10 of the act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it. Thereafter, the Board may proceed pursuant to section 102.50 insofar as applicable. (emphasis supplied)

Section 102.48 (d)(1) reads as follows:

A party to a proceeding before the Board may, because of extra-ordinary circumstances move for reconsideration, rehearing or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously,

and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing, will be taken at any further hearing.

Desco's position is stated in its motion for reconsideration of board order located at A. 473-476. In addition to the argument made therein, respondent wishes to point out to the Court that credibility findings made at the second hearing were the complete reverse of those made by Administrative Law Judge Constantine, on the same set of facts.

A reading of §§102.49 and 102.48 provides that the Board may remand a case de novo under certain circumstances. As provided for in §102.48(d)(1), a motion must be made by a party to the proceeding, because of extra-ordinary circumstances after the Board's decision or order. A motion pursuant to §102.48(d)(1) was not made by any party to the proceeding, but the Board took it upon itself to claim prejudicial conduct and only after the Administrative Law Judge made his findings of fact and conclusions of law. This is contrary to the authority vested in it by Congress, and has led to the ridiculous situation where two Administrative Law Judges made opposite credibility findings upon the same set of facts and the same witnesses.

It is the respondent's position that the NLRB exceeded its authority when it remanded the case and ordered a hearing de novo.

2. Alleged Violations of §8(a)(1),
(2), (3) and (5) and §8(b)(1)
(a) and (2) of the Act.

The findings of the Board of independent violations of §8(a)(1), are made as if these statements are unrelated and isolated from the total background of the case. The Board, in its brief, quotes cases unrelated to the highly unionized state of facts as they exist in the construction industry in the State of New York; especially in the situations presented to this Court.

In Irving Air Chute Company v. NLRB, 350 F.2d 176 (1965), the Court stated, at page 180:

"[8] The Board's findings 'cannot stand in the face of the First Amendment or of §8(c) if the employer's statement *** does not contain some threat of reprisal or force or promise of benefit.'" Coppus Eng'r Corp. v. NLRB, 240 F.2d 564, 570-571 (1st Cir. 1953). But "in determining whether such statements and expressions [urging formation of an independent labor organization] constitute, or are evidence of unfair labor practice, they must be considered in connection with the positions of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties. If, when so considered, such statements for a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by section 7 [of the Act], such statements must still be considered as a basis for a finding of unfair labor practice." (Emphasis supplied.) NLRB v. Kropp Forge Co., 178 F.2d 822, 828-829 (2d Cir. 1950)."

In NLRB v. Gissel Packing Co., 395 U.S. 570, 618, 89 S.Ct. (1918), 23 LP Ed. 2d 547 (1969), at page 518, the Supreme Court held that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat or reprisal or force or promise a benefit.

The unstrained version of what really happened and supported by the record is as follows:

Desco had a long history of collective bargaining with the Masons Unions. During a period of time in its history, the company was engaged in the installation of heavy cementous tile and terrazzo materials. This required the use of Masons and helpers, the helpers forming their own unit of employees.

The employer's relationship changed when its management changed. New management decided to discontinue installing heavy cementous products and concentrated on the installation of special chemical coatings. In 1972, a national association, of which the employer was a member, negotiated a tri-party agreement which bound the members of the association to that agreement and local Masons and Painters agreements. This was an attempt on the part of the international unions and association to eliminate work jurisdiction disputes and provide for the creation and training of a new unit of employees called Chemical Product Workers. These employees were to come from the ranks of the Masons and Painters Unions. Desco fashioned its labor relations after this labor agreement

and applied the agreement to its operation.

At that time, in February of 1972, the employer had a written agreement with the Masons and no written agreement with Local 59. Apparently, the union security provisions of the contract were not enforced by the Masons Union with respect to the helpers. In November of 1973, the Helpers Union attempted to bind Desco to the terms and conditions of the Local 59 contract. This attempt was rejected. Nothing was heard from Local 59 until December of 1974 when Desco was commencing an extremely large construction installation at the Empire State Plaza, Albany, New York. At that time, Lavenberg (Business Agent for Local 59), sent Desco copies of the area Local Collective Bargaining Agreement, which Desco did not sign.

On January 24, 1975, the first conduct complained of by the Board occurred. Desco was advised by an employee that he had been coerced by Local 59 into filing an application for membership. On January 27, 1975, Joseph Cordi, President of Desco, went to the employees at the construction site to determine if the report made to him was correct. He asked an employee whether or not he had filled out an application with Local 59. The employee admitted that he had, and asked if he had done anything wrong. The employer assured him he had not. Later that same day, both the Business Agent for Local 59 and Joseph Cordi went to the employees involved and asked whether or not they were coerced into joining the union. One employee stated that he was so coerced and the Business Agent refunded both initiation fees.

The Labor Board points to these instances and states that this conduct was interrogation of employees, and a violation of §8(a)(1) of the Act. However, as stated by the cases cited above, there was no evidence of threats or coercion on the part of the employer. Consequently, the Board's findings of violation in this instance should be rejected.

On January 30, 1975 the Business Agent for Respondent Local 6 came to the job site and again two employees who had been employed for many years by Desco were offered an opportunity to be upgraded. As found by the Administrative Law Judge and the Board in its decision and cited in the Board's brief, the upgrading of experienced individuals to mechanics was not a deviation from the ordinary procedure followed by the company. An examination of the conversation which took place between the employees and the Union with the employer shows no coercion or threats. The Board, however, views this situation as a promise of benefit by Desco in an effort to convince the employees to withdraw from the Helpers Local. The Board also points to this incident as unlawful assistance to Local Union No. 6. Local Unions No. 6 and 16 were the recognized bargaining representative of Desco's employees at this time. As the Board found, at best, the Helpers had only an implied contract with Desco.

In a recent Supreme Court decision handed down on January 17, 1978, the Supreme Court of the United States considered, in detail, the effect and scope of union and employer responsibilities under Section 8(f) of the National Labor

Relations Act. (Pub. L. No. 257 §704; 86 Cong. 1st Sess., 73 Stat. 541 [1959]) NLRB v. Iron Workers, Local 103 (Higdon Contracting Co.), 97 LRRM 2333.

There is no question that Desco is a construction contractor and that all the unions involved represent building trades unions and that all the contracts are pre-hire agreements.

In IronWorkers Local 103, supra, the Supreme Court specifically addressed itself to how §8(f) is to be construed and what consequences and effect the execution of a pre-hire agreement have on the enforcement of other sections of the Act, primarily §8(a)(5) and 8(b)(7)(C). One of the holdings was that a construction trades union violated §8(b(7)(C) when it picketed to enforce a pre-hire agreement where a union failed to establish majority support.

The Court reasoned that it is an unfair labor practice for an employer under Section 8(a)(1) and (2) and for a union under 8(b)(1)(A) to interfere with, restrain or coerce employees in the exercise of their rights to select their representative. Citing its decision in Garment Workers v. NLRB, 366 U.S. 731, 737, 48 LRRM 2251 (1961), it again held to the general rule that a union and employer commit unfair practices when they sign a collective bargaining agreement recognizing the union as the exclusive bargaining representative, when, in fact, only a minority of the employees have authorized the union to represent their interests.

However, the Court found that Section 8(f) is an exception to this rule. An employer in the construction industry may execute an agreement with a minority union without violation of the law. This exception is of limited scope. The Court cited the Board's holding in Ruttmann Construction Co., 191 NLRB 701, 702, 77 LRRM 1497 (1971), where the Board held a "pre-hire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship."

The basic facts in Ruttmann Construction Co., supra, are almost identical to the case before this Court. The construction employer had two collective bargaining agreements, one with District 50 and one with the United Mine Workers. The trial examiner (Administrative Law Judge) found the employer had a valid pre-hire contract within the purview of Section 8(f) of the Act, and its refusal by failing and refusing to apply the District 50 agreement, then in effect, to its employees at the construction project and further by executing and applying an agreement with the United Mine Workers, including a union security provision, to those employees, violated Section 8(a)(1), (2) (3) and (5) of the Act. The Board disagreed with this finding and concluded that a literal interpretation and application of the employer's contract with District 50 would ignore industrial reality and would not effectuate statutory policy of promoting industrial peace and stability.

The Board also held that a failure to abide by a pre-hire agreement is not a refusal to bargain. It cited the circumstance that the employer was bound by pre-hire agreement with the United Mine Workers by virtue of its membership in an association that bound its members to a general pre-hire agreement. Earlier contracts with District 50 also bound the employer. Consequently, irrespective of which union contract was applied to a particular job site, the respondent would apparently be in violation of one of the contracts.

The Board further found that the employer's application of the UMW contract was in accord with its membership in the contractors association which had recognized the UMW as routine in nature and did not constitute illegal assistance or discrimination within the meaning of Section 8(a)(1), (2) and (3) of the Act.

Respondent Desco is at a loss to find a discernible difference between the facts in the Ruttmann case and the case before this Court. The only real difference is that in the case before the Court there are two collective bargaining agreements, the NADAF agreement which was in writing and executed by Desco and the implied contract which the Board finds existed between Desco and Local 59. Wouldn't Desco be in the ridiculous position of having to make a choice between two agreements and being in violation of one, no matter which one it selected? The answer is yes.

Both the NADAF agreement to which Desco was bound for over two years, and the local area agreement contained union security clauses. If Local 59 was contesting the Masons' representation of Desco employees, it could and should have availed itself of the election procedure in Section 9 of the Act.

As stated in the Board's brief, an employer's refusal to honor a collective bargaining agreement executed with the union having majority support is a refusal to bargain. NLRB v. Hyde, 339 F.2d 568, 571-573 (CA 9, 1965).

A contract with a representative majority also carries with it the presumption that the union's majority status still obtains. Dayton Motel, Inc., 192 NLRB 674, 668, remanded 474 F.2d 328 (CA 6, 1973), enforced 525 F.2d 476 (CA 6, 1976).

In November of 1973 when Desco denied that Local 59 represented its employees, Local 59 made no attempt to enforce its agreement or continue its claim to representation by either filing charges of unfair labor practices or a petition for representation under Section 9 of the Act.

In NLRB v. Irvin McKelvey, 475 F.2d, 1265, 82 LRRM 3015 (CA 3, 1973), the Court held that construction industry employers were excused from the duty of neutrality mandated by the prohibition against unlawful interference in Section 8(a) (1), (2) and (3). The Court further held that at the same time the final proviso of Section 8(f) establishes that recognition via the 8(f) route shall not be a bar to a Section 9(c) petition by employees or by a rival labor organization for

a representation election. In the construction industry, the employer need not remain neutral in representation matters, but both the employees and rival labor organizations are free to resort to the Board for a representation election at any time.

Consequently, since an employer need not be neutral in representation matters, then Desco was free to enter into the NADAF pre-hire contract in February, 1972.

The Third Circuit in the Irvin McKelvey case, supra, further found that nothing in the text of the legislative history suggests that an employer was free to repudiate contracts at will. The Court carefully made a distinction that a violation of §8(a)(5) was found in a case where there was a union security clause, dues check off and no petition for representation election filed by the employees bound by these contract provisions. It did not make a finding where there was not an executed contract without the dues check off or union security clause.

Consequently, Desco could not repudiate its NADAF agreement without a clear showing that Local 59 represented a majority of Desco's employees or a majority of Desco's employees in an appropriate unit, either by way of some showing of interest such as cards or applications, ~~or~~ by the filing of a petition with the National Labor Relations Board. As between the two conflicting claims, Desco was bound to abide by the NADAF agreement.

It is conceded by all, including the Helpers and the Board, that there were substantial changes in the business at Desco.

In NLRB v Security Columbian Bank Note Co., (CA 3, 1976), 541 F.2d 135, the United States Court of Appeals for the Third Circuit determined that an employer's justifiable business purposes in instituting changes in operations and organizations exempt an employer from the sanction of §8(a)(5) of the Act.

Directing our attention to the Board's contention that Desco violated §8(a)(5) by instituting unilateral changes in working conditions, the Board and the Administrative Law Judge found that an implied contract existed between Desco and Local 59. The Board, in its brief, contends that although Desco did not violate §8(a)(5) by refusing to sign the area agreement, a change in the terms and conditions contained in that agreement without consultation with Local 59 is a violation.

In Emery Air Freight Corp. v. Local 295, Teamsters, 449 F.2d 585, this Circuit Court found that an employer could not be bound to the terms of a contract where some question existed as to its existence. In the case before the Court, there is no question that there was no contract between Desco and Local 59. (see Laborers v. Sheesley-Winter Constr., 421 F.Supp.137)

It is quite apparent that all parties to this case felt there was a jurisdictional dispute over which union was to do the work contracted by Desco, rather than a question of which union represents a unit of employees.

The Board refused to accept this condition, despite the fact that Local 59 referred the matter to the National Joint Board for the Settlement of Jurisdictional Disputes.

In addition, the wording on the picket signs clearly showed that the intent of the union was to force Desco to comply with the decision of the National Joint Board. This holding was not binding on Desco because Desco did not have an executed contract with Local 59 referring jurisdictional disputes to the National Joint Board.

Respondent will not attempt to cite the many cases on jurisdictional disputes, but will point to one in particular. In Marble Polishers (Mercury Tile Co.), 22 NLRB No. 68, the jurisdictional dispute involved locals from the same two internationals, the Tile Helpers and Bricklayers, Masons and Plasterers. The work in dispute concerned the assignment of the mixing of mortar, all clean up work, grouting and the handling of materials that may be used by Tile layers or similar workmen. The Board found in favor of the Helpers; but, it must be remembered that the work assignment was made on what Helpers "traditionally" performed.

What is interesting in this case is that the Helpers were laid off and the work was assigned to the Masons apprentices. The Board found that a jurisdictional dispute existed and that the case was properly before it. The employer was not charged or found to be in violation of §8(a)(1), (3) and (5) of the Act because of his assignment or mis-assignment.

In Plasterers Local 21 (Universal Terrazzo & Tile Co.), 218 NLRB No. 96, the BMPIU was awarded the installation of

conductive and seamless flooring -- the same work involved in the case before this circuit.

It is the employer's contention that an employer may not unilaterally change working conditions, wage rates, or fringes under an existing collective bargaining agreement, but that he may assign certain work tasks to a particular building trades union. It is only after this assignment that employee rights under the collective bargaining agreement apply.

The fact that a construction employee works for a contractor on a particular work tasks, does not give that employee a continuing right to perform that work function. To so find would lead to the untenable result that whatever union gets a man on the job first has a right to the whole job, and an employer has a right to make a work assignment.

It is respondent's further contention that a contractor does not violate the law when he advises new employees that he is a signator to a collective bargaining agreement with a building trades union which contains an assignment of work and a union security clause which requires the employee to become a member after seven days.

Finally, the Board asks this Court to sustain its finding that Desco violated §8(a)(1) and (3) of the Act by refusing to reinstate unfair labor practice strikers upon their unconditional requests to return to work.

There is no record evidence to sustain this finding

because the record discloses that all the employees returned to work at the termination of the picketing. There is no evidence in the record of the employer's refusal to reinstate any of the employees who were on strike.

CONCLUSION

The substantial evidence in the record as a whole fails to support the Board's finding, and respondent Desco respectfully requests that a judgment should not issue enforcing the Board's Order.

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